FILE COPY.

FILED
APR 17 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1904.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE METROPOLITAN STREET RAILWAY COMPANY,
Plaintiff in error,
versus
THE STATE BOARD OF TAX COMMISSIONERS. — No. 74

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE TWENTY-THIRD STREET RAILWAY COMPANY,
Plaintiff in error,
versus
THE STATE BOARD OF TAX COMMISSIONERS. — No. 75

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE CENTRAL CROSSTOWN RAILROAD COMPANY,
Plaintiff in error,
versus
THE STATE BOARD OF TAX COMMISSIONERS. — No. 76

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

WILLIAM D. GUTHRIE,
Of counsel for plaintiffs in error.

WASHINGTON, April 15, 1905.

[18,995, 18,996, 18,997.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE METROPOLITAN STREET RAILWAY COMPANY, *Plaintiff in error*, *versus* THE STATE BOARD OF TAX COMMISSIONERS.	No. 74
THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE TWENTY-THIRD STREET RAILWAY COMPANY, *Plaintiff in error*, *versus* THE STATE BOARD OF TAX COMMISSIONERS.	No. 75
THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE CENTRAL CROSSTOWN RAILROAD COMPANY, *Plaintiff in error*, *versus* THE STATE BOARD OF TAX COMMISSIONERS.	No. 76

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

I.

For the purpose of confining the discussion to the questions actually arising in the cases at bar, as well as of preventing the useless citation of authorities upon propositions which were neither involved nor disputed, the plaintiffs in error endeavored to state plainly in their brief that they conceded their liability to all forms of taxation, such as on property, on franchise to be a corporation, on capital stock, on dividends, etc., which taxes, indeed, they have been paying

for many years in at least six different forms (plaintiffs' brief, pp. 29–30). Hence, it is not a little disappointing to find their position so radically misapprehended that the answering brief on behalf of the defendant (p. 26) represents them as claiming that an agreement as to a fixed rate of franchise tax operated to remit all further obligation to pay taxes of any other kind. This is so clearly an erroneous understanding of plaintiffs' contention that the only answer may be in the language of Mr. Justice Harlan in the recent *Northern Securities* case (193 U. S. 197, 334), viz.,

> "Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply."

To repeat, as stated fully in the brief filed by the plaintiffs in error, the inquiry to which the attention of the court is to be directed is not whether special franchises to use the streets of a city constitute property subject to taxation, for that is not disputed, nor whether an agreed franchise tax operates to exclude or prevent other taxes, such as on property, dividends, etc., for that has never been even suggested, but whether the contracts under which the particular franchises of the plaintiffs in error were acquired provided for a fixed and agreed franchise tax which cannot be increased. The case is not one of exemption from taxation at all. On the contrary, the plaintiffs in error have for years been paying large amounts as taxes

on these very franchises as well as numerous other taxes. The only question is whether the agreed franchise taxes can be increased without impairing the obligations of the several contracts.

It is, of course, manifest that an agreement to pay a fixed special franchise tax does *not* exclude any other form of taxation unless the contract provides that the agreed franchise tax shall be "in lieu of other taxes." Some such language is always necessary if it be the intention of the parties that the agreed tax shall exclude *other* forms of taxation. But, in such a case, could the fixed and agreed tax be, nevertheless, increased? Would it be necessary to state not only that the agreed franchise tax was in lieu of other taxes, but that it could not be increased? Surely not. It would be held that the franchise tax had been made the subject-matter of agreement and that the state or city must be content to measure its taxation on such franchise by its contract. When we say that the mention of a fixed and agreed franchise tax does not of itself exclude *other* taxes, we are but recognizing that there are many different and distinct subjects of taxation, and that when parties contract as to one subject of taxation and are silent as to others, it cannot reasonably be assumed that they intended to exclude or contract with reference to such other unmentioned subjects.

II.

The two New York cases relied on by the plaintiffs in error, and in the light of which their contracts were made, namely, *Mayor* v. *Second Av. R. R.*, 32 N. Y. 261

(cited by this court in *Royall* v. *Virginia*, 116 U. S. 572, 582), and *Mayor* v. *Third Avenue Railroad Co.*, 33 N. Y. 42, are sought to be distinguished by the statement that the additional taxes then imposed were not under a general law of the state, but were "a mere effort on the part of the City to impose the obligation of paying an additional consideration for the rights conferred on the grantee" (deft's brief, Brooklyn City case, p. 55).

There is, of course, no practical difference between imposing additional obligations by way of a local or city tax and imposing such obligations under a general law of the state, making the property subject to assessment for local or city taxes. The practical and intended effect of the law now before the court is to enable the city to exact from its grantees hundreds of thousands of dollars per annum of taxes in addition to the payments stipulated for in the several agreements. The practical effect of the legislation is exactly the same as if an act had been passed authorizing the city to make this additional exaction. The form that the legislation has taken cannot change the nature of the burden imposed. It would be a strange doctrine if the mere manner or method in which legislation reaches a party could avoid the constitutional guaranty against the impairment of the obligation of contracts, which the Constitution intends shall not be impaired in any form or degree or manner "upon any pretext whatever." The defendant's suggestion is well answered by the language of Chief Justice Marshall in the famous case of *Brown* v. *State of Maryland*, 12 Wheat. 419, 444, as follows:

> "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing."

The defendant's brief then proceeds to argue (p. 56) that if these two cases are in point, and they certainly are, "then they must be deemed overruled by the decision of that Court [Court of Appeals] in the present case. At all events, they are not authority in this Court."

Concededly, the prior decisions have been overruled in the cases at bar. That much is beyond dispute. But defendant's argument overlooks the settled doctrine of this court that, when the highest court of a state has adjudicated upon the validity and legal scope and effect of a contract, particularly that of a municipality, and subsequent contracts are made on the faith of, and enormous sums are invested in reliance upon, such judicial interpretation, every principle of fairness and justice requires that the contracts shall be construed and given legal effect according to the law as it was authoritatively declared to be at the time the contracts were entered into. In a word, the local courts cannot overrule their prior decisions as to past contracts and rights vested on the faith thereof. When the numerous franchises in the cases at bar were sought by the railway companies, when they were put up by the city at auction to the highest bidder, when the legislature and city solicited capitalists to embark and risk their funds, when the legislature and the city exacted the most onerous terms and generally at public auction, all parties knew that the

Court of Appeals of the state had, in 1865, declared the law to be that such a grant of a franchise to use the streets of a city constituted a contract, and that, if the city stipulated in the grant for a fixed license fee or tax, it could not increase that tax without impairing the obligation of its contract, *and this undoubtedly added to the terms which investors were willing to bid or agree to.*

As Mr. Justice Strong said, speaking for the court, in *Olcott* v. *The Supervisors*, 16 Wall. 678, 690:

> "This court has always ruled that if a contract when made was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice. *Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed.*"

Or as Mr. Justice Swayne said in *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, 206:

> "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

In *Taylor* v. *Ypsilanti*, 105 U. S. 60, 71, Mr. Justice Harlan said:

> "But all along through the reports of our decision are to be found adjudications in which, upon the

fullest consideration, it has been held to be the duty of the Federal courts, in all cases within their jurisdiction, depending upon local law, to administer that law, so far as it affects contract obligations and rights, as it was judicially declared to be by the highest court of the State at the time such obligations were incurred or such rights accrued. And this doctrine is no longer open to question in this court. It has been recognized for more than a quarter of a century as an established exception to the general rule that the Federal courts will accept or adopt the construction which the State courts give to their own Constitution and laws."

See also *Douglass* v. *County of Pike*, 101 U. S. 677, 686; *New Buffalo* v. *Iron Co.* 105 U. S. 73, 75; *Stanly County* v. *Coler*, 190 U. S. 437, 445; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Warburton* v. *White*, 176 U. S. 484, 495; *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S. 558, 575; *Muhlker* v. *New York & Harlem R. R.*, decided April 10, 1905.

It was because this rule was regarded as axiomatic in our jurisprudence that the plaintiffs in error conceived it unnecessary to cite the authorities in their brief. The mere mention of the doctrine was thought sufficient, which was made by saying that the contracts were entered into in the light of the settled law of the state (p. 33). Unless we are very much mistaken, it was in the state of New York that this principle of fairness and justice first received authoritative recognition as a proper element in shaping the law. Thus Chancellor Kent in *Lyon* v. *Richmond*, 2 Johns. Ch. 51, 60, among other things, said:

"And to permit a subsequent judicial decision in any

> one given case, on a point of law, to open or annul every thing that has been done in other cases of the like kind, for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found."

When it is borne in mind that the growth of the city of New York and the tremendous increase in values have been due in great measure to the development of transportation facilities; that the furnishing of these facilities has required constant investment of enormous capital; that the funds necessary to provide these conveniences for the community would otherwise have had to be secured through burdensome taxation, and that the city has for many years received annually and is still collecting annually hundreds of thousands of dollars from the stipulated payments and percentages, it is submitted that the following language of Mr. Justice Harlan, delivering the unanimous opinion of the court in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 670, 673, becomes singularly pertinent and persuasive, viz.,

> "It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas-works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty, of supplying gas of the requisite quality and in such quantity as the public

needs demanded. In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, this work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable either that the cost of supplying the city and its people would have been made, in some form, a charge upon the public, or the public would have been deprived of the security in person, property, and business which comes from well-lighted streets. . . .

"The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the State's power of eminent domain. *West River Bridge Co.* v. *Dix*, *ubi supra*; *Richmond, &c. Railroad Co.* v. *Louisa Railroad Co.*, 13 How. 71, 83; *Boston Water-Power Co.* v. *Boston & Worcester Railroad*, 23 Pick. 360, 393; *Boston & Lowell Railroad Co.* v. *Salem & Lowell Railroad Co.*, 2 Gray, 1, 35. In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the State that the contract with them will be performed."

III.

The defendant's brief contains the following statement (p. 28):

"The State of New York, at the time of the passage of the several statutes under which the relator's franchises are derived, did not contemplate the taxation of such franchises. It had for many years acquiesced

> in the adjudications of its courts, that they were not taxable. . . . If there was any implied contract, the minds of both parties must have met on all the terms of the contract. It will not suffice to say that the relator intended a certain thing, and that the State intended something else. Both must have intended and contracted for the identical thing."

It is submitted that it is begging the whole question to assert that the state of New York did not contemplate the taxation of these franchises. On the contrary, as declared by Governor Cleveland at the time, it was distinctly contemplated that the percentages of gross receipts imposed by section 8 of the act of 1884 were taxes. If it be meant that the state had acquiesced for many years in the decisions of the courts in the *Second Avenue Railroad* and *Third Avenue Railroad* cases above mentioned (32 N. Y. 261 and 33 N. Y. 42), that is conceded, for it was not until the cases at bar that those decisions were overruled. If, however, it be meant that the courts had decided that franchises were not taxable under the then existing general tax laws, how much more reason to have exacted taxes on all future grants? If it be true that the Legislature understood that franchises were not subject to taxation except by special statutory provision (*Monroe Savings Bank* v. *City of Rochester*, 37 N. Y. 365, 367; *Smith* v. *The Mayor*, 68 N. Y. 552, 555; *People ex rel. N. Y. E. R. R. Co.* v. *Com'rs*, 19 Hun, 460, 464; aff'd, 82 N. Y. 459), it only emphasizes the necessity of such provision. Hence the reason why taxation was specially provided for in the acts of 1884, 1886, etc.

Of course, the minds of parties must meet upon all

the terms of a contract, and both sides must have intended and contracted for the identical thing; but there is no such inquiry in the cases at bar. The fact is that the subject of taxes was in mind and was intended to be covered and contracted for. The question is whether the legal effect of such an agreement is or is not to prevent the state or city from increasing the stipulated payment.

It may seem necessary to repeat, in different and perhaps clearer language, the doctrine of implied obligations. We are not dealing with what the text-writers call contracts implied by law, which are frequently mere legal fictions and which arise where no actual contract or intent exists. In such cases, the contract is merely the mythical creation of the law, which says there was a promise because some plain legal obligation or legal right demands the performance of a legal duty, which can be enforced under existing theories of remedies only by presuming the existence of a contract when there really has been none at all.

But when we speak of obligations or covenants implied in fact, such as the obligations in the cases at bar not to increase the fixed or agreed franchise payments, we are not reading into the contract something that the parties did not contemplate and intend nor are we adding to the understanding of the parties. We are simply finding in the folds (*in* and *plico*) of the contract itself what plain sense and reason dictate the parties must have understood and intended. We are simply recognizing the obligations which arise according to the ordinary course of dealing and the common understanding of men (15 Am.

& Eng. Encyc. of L., 2d ed., 1078). The nature of the obligations which flow from the provisions of a contract according to this ordinary course of dealing and understanding is stated by Chief Justice Marshall, speaking for himself and Mr. Justice Duvall and Mr. Justice Story, in *Ogden* v. *Saunders*, 12 Wheat. 213, 341-342, as follows :

> "A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations, which, as honest, fair, and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares that certain acts, unexplained by compact, impose certain duties, and that the parties had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed every thing that is to be done by either."

Now, when the legislature in 1884–1886, authorized the sale at public auction to the highest bidder of these franchises, upon condition, among other things, that the grantee should pay three to five per cent. of the gross annual receipts, was it not reasonably understood by the city and the bidders that the legislature and the city, after having secured the highest terms by competitive bidding, could not turn around and render the franchises of less value by taxing them? Is there any reasonable doubt that every man who thought of bidding inquired of his lawyer whether the state or city could tax

the special franchise and thus increase the amount to be bid? And is it not reasonable to assume that he was advised that the Court of Appeals had declared that such an additional franchise tax or payment could not be imposed? Did not the legislature understand, and did not the executive at the time proclaim, that the exaction of a percentage of the gross receipts was a tax and nothing else; that is, an imposition or exaction for the supply of the public treasury—"a charge, a pecuniary burden, for the support of government"? *United States* v. *Railroad Company*, 17 Wall. 322, 326. When the legislature authorized the city to say to bidders, "we will give you the right to use the streets for railway purposes upon condition that you will pay a fixed sum per annum and a fixed percentage of your gross receipts," did not both parties understand that the payments were equivalent to taxes and that no further payments or percentages would be exacted in respect of the franchises so granted?

When the city secured the highest possible terms from the competing bidders and the railway companies accepted the conditions imposed and agreed to pay not only what they did but the fixed percentages of three and five per cent., did not both parties contract in the light of the settled doctrine of the Court of Appeals, that the grant of a franchise constituted a contract and that a subsequent tax could not be imposed thereon by the city without impairing the obligation of the contract? And finally, in connection with the present tax law, did not the executive and the legislature authoritatively recognize and declare that the existing contracts stipulated for taxes and that the agreed payments were

existing taxes and nothing else, and is not this almost a conclusive interpretation? Under such circumstances, does not plain common sense and reason and justice dictate the fairness and propriety of presuming that the railway companies and the city understood that they were stipulating for a franchise tax which could not be subsequently increased?

Plaintiffs in error are not asking the court to introduce new terms into the contracts under and by virtue of which they acquired their franchises. They are asking the court to declare that an agreement to pay a fixed annual franchise tax involves the reciprocal or mutual obligation on the part of the city and state not to increase that fixed and agreed tax while holding on to the full benefit of the contract.

The mere fact that the words "compensation" and "rental" were used by the legislature in any of the acts in question does not in any way tend to change the nature of the payment.

In *People ex rel. M. F. Ins. Co.* v. *Commissioners*, 76 N. Y. 64, 71, the court, by Church, Ch. J., said:

> "The principle upon which taxation rests, is that it is a contribution or *compensation* for the expense of protection to life, liberty, and property which the government furnishes."

And as Tiedeman points out in his work on State and Federal Control of Persons and Property (vol. 2, p. 619):

> "Taxation of real estate is essentially the same as rent, for it is not imposed as an obligation of citizenship."

IV.

The principal ground upon which defendant relies, however, seems to be the reserved power of the legislature to alter, amend, or repeal charters, under which it is contended the power exists to impose any new obligations in the way of taxes, or otherwise, at the discretion of the legislature.

Most of the franchises now sought to be subjected to additional taxation were granted by the city of New York, and were acquired by the railway companies, under and by virtue of express statutory authority beginning with chapter 252 of the laws of 1884, and the remaining franchises were acquired under direct grants from the legislature. In order the more succinctly to reply to the brief on behalf of the defendant, it will be convenient to consider separately these two different classes of franchises.

Counsel do not recall any case where it has been held that, under the reserved power to amend, alter, or repeal a charter, the legislature could nullify or impair the obligation of a contract between a corporation and a municipality or other third person. The case of *People* v. *O'Brien*, 111 N. Y. 1, is unqualifiedly to the contrary. And in *Lake Shore &c. Railway Co.* v. *Smith*, 173 U. S. 684, 690, Mr. Justice Peckham, speaking for the court, cited with approval the *O'Brien* case to the proposition that the power to repeal the charter did not authorize a state to "take away or destroy the property or annul the contracts of a railroad company with third persons," and used the following language (pp. 697-698):

"To say that the legislature has power to absolutely

repeal the charter of the company and thus to terminate its legal existence does not answer the objection that this particular exercise of legislative power is neither necessary nor appropriate to carry into execution any valid power of the State over the conduct of the business of its creature. To terminate the charter and thus end the legal life of the company does not take away its property, but, on the contrary, leaves it all to the shareholders of the company after the payment of its debts. . . .

"The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means."

The suggestion in defendant's brief (Brooklyn City case, p. 66), based upon the fact that section 19 of chapter 252, laws of 1884, contains a reservation of the power of the legislature to alter, amend, or repeal the *act*, is sufficiently answered by mentioning the fact that it was under this very statute that the franchise involved in the *O'Brien* case was granted by the city to the Broadway Railroad Company and held not to be repealable. The act did not reserve power to alter, amend, or rescind any franchise granted by the city or any private contract or vested rights acquired thereunder. If such a declaration had been made in the statute, it is highly improbable that any one would ever have invested in the enterprise.

Moreover, as stated in the plaintiffs' principal brief (p. 28), the position of the State Board of Assessors

below was quite different from what it now is, for as Judge Earl states in his opinion (Metropolitan rec., p. 456):

> "It is conceded that if the city or the state had exacted from these corporations for the use of their franchises, additional conditions or further payments than originally stipulated, such exaction would have been illegal as impairing the obligation of contracts."

The present argument seems to be that, even if the plaintiffs in error entered into valid contracts covering the subject of franchise taxes, the legislature, under the reserved power, may impose any new conditions it sees fit, or, to use the phrase of the defendant's brief at p. 41, "impose a new obligation on the relator in respect to the franchises derived from it." It is submitted, as not open to serious question, that the legislature could not impose any *new obligation* on the owners of franchises granted by the city without impairing the obligations of the several contracts. As the court said in *Planters' Bank* v. *Sharp*, 6 How. 301, 327:

> "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. *This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force.*"

Nor, as to direct grants, could the legislature "impose a new obligation on the relator in respect to the franchises derived from it."

It is difficult to perceive any reason why grants of franchises by the state should be governed by any different rules than grants by a municipality, for in each

case every element of contract fully exists. *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 567. The reasons which protect the grantee in the one case equally apply to the grantee in the other. The character of the obligation assumed and of the consideration to be paid is the same. The idea that the grants of a state are revocable has long since been exploded. *Fletcher* v. *Peck*, 6 Cranch, 87.

As Earl, J., said in *Langdon* v. *Mayor, etc., of City of N. Y.*, 93 N. Y. 129, 157:

> "Whenever legislative acts are in substance contracts between the State and the party who is to derive some right or benefit under them, then such contracts are not the less under the protection of the Federal Constitution, because they have assumed the form of acts."

There must obviously be a wide difference between amending or altering a charter and seeking to divest contract and vested rights. Moreover, in the present case there is not the slightest ground for holding that the legislature intended in any sense or form to amend or alter any of these charters, but they were left unaffected and all the obligations assumed were preserved.

The various acts by which the legislature granted special franchises are set forth in the principal brief at pp. 21–24 of the statement, and again at pp. 78–80 of the argument.

One of the three Metropolitan franchises so granted in 1871 provided for the appointment of commissioners "to appraise and determine the amount of compensation which shall be paid annually, or in a gross sum, to the mayor, aldermen and the commonalty as

such compensation for the rights or privileges herein granted" and further provided that "the amount so fixed and determined shall be paid to the commissioners of the sinking fund of said city, by the said company." The amount was thereupon "fixed and determined" at "one thousand dollars per annum."

Another of the Metropolitan franchises, granted by the legislature in 1874–75, provided originally for a payment of one per cent. of the gross receipts and contained a provision that the legislature might at any time alter, amend, or repeal the act. Subsequently, the act was amended so as to provide for the payment of two per cent. of the gross receipts instead of one per cent. as provided in the original act. This amendment was acquiesced in and never challenged by the company. The reason is quite obvious. Under the original act of 1874 (ch. 508), the company was limited to a fare of three cents; but the amendment of 1875 (ch. 393) increased the fare from three to five cents. As the company accepted this benefit, it could hardly have been heard to challenge the legality of the increase of the tax.

As to the franchise of the Twenty-third Street Company, originally granted in 1869 (ch. 823, Twenty-third Street rec., p. 34), the Commissioners of the Sinking Fund of the city of New York were directed to advertise and "*sell* at public auction to the highest bidder, the right, privilege and franchise" therein described. When the legislature authorized the officials of the city of New York to advertise and *sell* a franchise, this necessarily conferred power to make a contract of sale which should vest title in the "highest bidder."

The act under which the Central Crosstown Company acquired its franchise (L. 1873, ch. 160) provided for the payment of three per cent. of the gross receipts into the treasury of the City of New York, and that the *act* could be altered, amended, or repealed.

There are before the court only three franchises granted directly by the legislature under statutes providing for the payment of a fixed annual sum or percentage without the interposition of action by the city authorities and providing that the act might be amended, altered, or repealed (L. 1868, ch. 625; Metropolitan rec., p. 64; L. 1875, ch. 508, as amended, L. 1875, ch. 393; Metropolitan rec., p. 60; and L. 1873, ch. 160; Central Crosstown rec., p. 32). These, it is submitted, are the only franchises which come within the doctrine of the cases of *Covington* v. *Kentucky*, 173 U. S. 231, and *Citizens' Savings Bank*, v. *Owensboro*, 173 U. S. 636, and other familiar cases of like import.

It may be added here that in the case of *Mayor, etc.* v. *Twenty-third St. R. Co.*, 113 N. Y. 311, principally relied on by defendant, the subsequent act not only was passed within a little more than a month after the original grant, and before the company had done anything or taken any action on the faith of the grant, but also changed the tax from a license fee of fifty dollars per car to "one per cent. of the gross receipts of said company" and extended the date from which the tax should be computed. For all that appears, the substitution of the percentage on the gross receipts, coupled with the extension of the date from which the tax should "commence to be computed," were, at the

time, considered distinctly advantageous to the company. It was insisted on the part of the city in that case, as appears by its brief, that the company had accepted the benefit of the act and (p. 34), therefore, "could only either accept or reject the act or else do nothing under or in reference to it." (See also discussion principal brief at pp. 84-86.)

This case, however, brings out clearly and emphasizes another important fact, namely, that the legislature, as early as 1873, considered license fees and percentages of gross receipts equivalent or similiar in nature. In the first act, license fees were imposed, which no one would question are essentially taxes, for the Court of Appeals had so decided, while in the amendatory act percentages of gross receipts are substituted for license fees. In other words, one form of tax was substituted for another.

V.

It is further argued by defendant that if there be the slightest doubt as to an exemption from taxation or as to the validity of a contract for a fixed amount of tax, the case is at once to be resolved against the grantees of these franchises. The old idea seems again presented that because the state court has overruled the contention of the plaintiffs in error as to the legal effect of the contract, this court must surrender its judgment, abide by the view of the state court, and decide against the grantee. That no such abdication of judicial duty is permissible has been often recognized. *Citizens' Bank* v. *Parker*, 192 U. S. 72, 85; *Freeport Water Company* v. *Freeport City*, 180 U. S. 587, 610.

There is also to be found in defendant's argument the familiar plea as to the necessity of preserving the taxing power, etc., etc., as if there were any danger to the taxing power in the cases at bar where the plaintiffs in error and those similarly situated are now paying hundreds of thousands of dollars annually in taxes not only on their franchises but on everything else.

As Mr. Justice Strong said, speaking for the court in *Murray* v. *Charleston*, 96 U. S. 432, 444, 448–449:

> "We do not question the existence of a State power to levy taxes as claimed, nor the subordination of contracts to it, so far as it is unrestrained by constitutional limitation. But the power is not without limits, and one of its limitations is found in the clause of the Federal Constitution, that no State shall pass a law impairing the obligation of contracts. A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a State legislature. The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted State taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power. . . .
>
> "There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of con-

tracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."

VI.

Plaintiffs in error conceived that it was a strong and persuasive fact that Governor Cleveland, in approving the act of 1884, denominated the percentages exacted as "taxes" (plaintiffs' brief, p. 10). The message of that distinguished statesman, affording, as it does, clear proof of contemporaneous interpretation and of the opinion of the community, is now characterized in defendant's brief (p. 32) as a "gloss," although the parties who entered into the contracts under that act and similar legislation must have known and relied upon the fact that the governor of the state of New York had declared that the payments of percentages of gross receipts constituted taxes.

But, exactly what is meant by this suggestion that Governor Cleveland's message was a *gloss*? To give a gloss to an act of the legislature is, according to the settled definition of the lexicographers, "to give a false or artificial appearance to" it. Now, granting *arguendo*, with every reservation that the suggestion is preposterous, that the governor of the state of New York wanted to give a false appearance to the act, does that help or commend the argument of the defendant State Board of Assessors? Does it enable the city and state, after the contracts have been made and immense sums have been invested in these franchises, to turn around and

repudiate the declaration of the governor of the state as mere gloss and now assert that it was not a tax at all?

VII.

In answer to the contention of the plaintiffs in error that the act in question arbitrarily discriminated against members of the same class, the defendant suggests on page 51 of the brief that the plaintiffs in error are not aggrieved by the legislative discrimination, because they are beneficiaries under section 46 of the Special Franchise Tax law, which allows deductions. This argument, however, entirely disregards the fact that the Twenty-third Street Company, which paid a lump sum of $150,000 *after competitive bidding*, is allowed no deduction whatever; nor is the Metropolitan Company allowed any deduction in respect of the franchise it holds, which does not provide for any annual payments.

For example, we find, in the case of the Metropolitan franchise granted under the act of 1871 (ch. 19, Metropolitan rec., pp. 66, 68), that the statute provided that commissioners were to "appraise and determine the amount of compensation which shall be paid annually *or in a gross sum*," and that the commissioners determined to exact $1,000 per annum instead of a gross sum. The owner of this franchise is allowed to deduct the annual payment. On the other hand, in the case of the Twenty-third Street Company, under substantially the same statutory provision, although in a different act, the commissioners appraised and determined the amount of compensation to be a lump sum of $150,000 instead of an annual payment. The com-

pany, however, is entitled to no allowance or deduction whatever from the tax.

It is submitted that if deductions were to be made in respect of payments for franchises, it was arbitrary to refuse to make any allowance whatever in respect of those who had paid lump sums for their franchises while allowing those who agreed to pay annual amounts, in lieu of a gross sum, to deduct *from* the tax every cent that they were paying as compensation for their franchises. It was, of course, perfectly feasible to have allowed those who paid lump sums to deduct an equivalent amount.

CONCLUSION.

In considering these cases, it should always be borne in mind that although in 1899, there were many corporations in the state of New York which were enjoying valuable franchises and paying no taxes whatever upon them, and which had never paid any such taxes, there were other corporations, such as the plaintiffs in error, which for years had been paying enormous sums into the treasuries of the various cities of the state.

Whatever propriety and justice there may have been in drawing under the general tax laws of the state the numerous franchises which had been granted for no consideration, and the owners of which had never contributed to the taxes of the state, it was fundamentally unfair and unjust to disregard the contract rights of those who had for years been paying enormous taxes on their franchises, and, while preserving to the letter (sec. 47) the burden assumed, refuse to recognize any reciprocal

obligation to abide by contracts entered into upon the plighted faith of the city and state. *Stearns* v. *Minnesota*, 179 U. S. 223, 261; *Duluth &c. R'd* v. *St. Louis County*, 179 U. S. 302, 305.

WASHINGTON, April 15, 1905.

WILLIAM D. GUTHRIE,
Of counsel for plaintiffs in error.